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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 519

WESTERN & ATLANTIC RAILROAD, APPELLANT,

versus

MRS. MARY E. HENDERSON ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

PETITION TO REHEAR.

MAY IT PLEASE THE COURT:

Appeal papers in this case were perfected in the proper way and on November 14, 1928, the Railway, conformably to paragraph 1 of Rule 12 of this Court, filed a brief on jurisdiction alone. No effort was made to support the Federal question involved.

On January 2, 1929, this Court dismissed the appeal, not on jurisdictional grounds *but on the merits*,

citing Mobile, Jackson and Kansas City Railroad *v.* Turnipseed, 219 U. S., 35, as authority therefor.

The Railway has never had an opportunity to present its views on the ground on which the case was dismissed.

The Mississippi *Prima Facie* Act involved in the Turnipseed case is entirely different from the Georgia statute here involved. The meaning and effect of the Mississippi statute as construed by the Mississippi courts is in all respects different from the meaning and effect of the Georgia Act as construed by the Georgia courts as the attached brief will, we believe, demonstrate.

Rehearing is respectfully asked to the end that we may have the chance to at least present to the court our views on the meritorious question.

Respectfully submitted,

WESTERN AND ATLANTIC RAILROAD,

By FITZGERALD HALL,

Vice-President and General Counsel.

JANUARY 11, 1929.

I, Fitzgerald Hall, vice-president and general counsel of appellant, the Western and Atlantic Railroad, hereby certify that the meritorious question in this case has been given the best thought of which I am capable and it is my profound conviction after prolonged study that the Georgia statute under attack is invalid on the grounds stated in the attached brief which I prepared.

This petition is not filed merely to delay the payment of the judgment but in the good faith endeavor to have the Court at least read what we have to say on the merits of the Federal question.

FITZGERALD HALL.

JANUARY 11, 1929.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 519

WESTERN & ATLANTIC RAILROAD,
APPELLANT,

Versus

MRS. MARY E. HENDERSON AND MARYLAND CASUALTY COMPANY,
APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF AND ARGUMENT FOR WESTERN & ATLANTIC RAILROAD.

MAY IT PLEASE THE COURT:

J. C. Henderson of Dalton, Georgia, was employed by the Coca Cola Bottling Works as the driver of one of its trucks (R., 93) which on August 4, 1924 (R., 93) he was driving to Chattanooga for repairs (R., 95) when he collided on

a grade crossing, near Tunnel Hill, Georgia, with one of appellant's (hereinafter called the Railway) trains and was killed. (R., 93, 112-113.) His widow (hereinafter called the Plaintiff), Mrs. Mary E. Henderson, brought suit against the Railway to recover damages for his death. (R., 46-49.) The Maryland Casualty Company, which had a policy on said Coca Cola Company's employees, intervened. (R., 52-56.)

Upon trial there was a verdict against the Railway for $10,000.00. This was reversed by the Georgia Court of Appeals for a technicality in the charge not important here. (R., 25.) *Western & Atlantic R. R.* v. *Henderson*, 35 Ga. App., 353, 133 S. E., 645.

Plaintiff amended her petition (R., 25, 50) and on the second trial obtained a verdict of $15,000.00. Judgment was entered thereon. (R., 25, 57-58.) The eighteenth ground of the Railway's motion for a new trial challenged the constitutionality of Section 2780 of the 1910 Georgia Code upon which part of the trial judge's charge was based. (R., 81-82.) This was overruled (R., 60) and the Railway appealed to the Georgia Court of Appeals which affirmed the judgment below, pretermitting any discussion of said constitutional question. (R., 174-176.) *Western & Atlantic R. R.* v. *Henderson, et al*, 36 Ga. App., 679, 137 S. E., 855.

The Railway filed a petition for certiorari in the Supreme Court of Georgia (R., 10) raising said constitutional question in its seventh assignment of error (R., 20-22). *The petition was granted for the sole purpose of considering said constitutional question.* (R., 23, 34, 35.)

The judgment was affirmed. (R., 39-40.) *Western & Atlantic R. R.* v. *Henderson et al* (Georgia Supreme Court, September 15, 1928), 144 S. E., 905. The case is here on appeal, the constitutional question alone being presented. (R., 1-7.)

JURISDICTION

Conformably to paragraph 1 of Rule 12 of this Court the Railway on November 14, 1928, filed a brief on jurisdiction. No reply brief was filed.

STATEMENT OF THE CASE.

The pleadings.

The original petition filed by Plaintiff set forth the death of her husband resulting from a collision on a grade crossing between the truck he was driving and one of the Railway's trains. (R., 46-49.) The negligence relied on was thus summarized by Plaintiff herself:

> "11. That defendant was negligent and careless in failing to maintain and keep its track where the public road crossed in proper condition and repair. (b) In removing the dirt and ballast from the said tracks and leaving the crossties and railroad rails exposed and dangerous as hereinbefore set out. (c) In failing to give warning and signal of the approach of the train by blasts of the whistle and as provided by law and as heretofore set forth. (d) In failing to keep a lookout after reaching the furtherest blow-post as prescribed by law. (e) In failing to check the speed of the train after seeing plaintiff's husband crossing and on the tracks. (f) In ac-

celerating the speed of the train or engine and running into the said truck and killing her said husband. (g) In running at such great and dangerous rate of speed as heretofore mentioned and alleged upon and over the said public road crossing in said county. (h) In failing to stop the engine after the danger was apparent to the employees in charge of the engine. (i) In not having the engine under control in approaching the said crossing. All of which said acts and failures to act contributed to and wholly caused the said death of her said husband, who was in the exercise of all ordinary care and diligence." (R., 49.)

After the first trial Plaintiff amended her petition to allege that the Railway was further negligent in putting in charge of its train "a practically blind engineer." (R., 51.)

The Maryland Casualty Company, having paid Plaintiff some insurance moneys, intervened to be subrogated to part of Plaintiff's recovery, if any, against the Railway. (R., 52-56.)

The Railway's original and amended answer constituted a general denial of the averments of Plaintiff's petition, original and amended. (R., 50-51.)

The trial.

Plaintiff proved the fact of collision between the truck her husband was driving and one of the

Railway's trains and the death of her husband as a result thereof. (R., 88-89, 93-94.) *There was no proof to support in any degree many of the averments of negligence above set out*, to-wit, averments c, d, e, f, g, and i of paragraph 11 of the original petition (R., 49) set out *in extenso supra*, pages 4-5, and the averment of defective vision in the amended petition (R., 51). There was the merest shadow, if any, of proof to sustain the other averments.

Section 2780 of the 1910 Georgia Code is as follows:

> "A railroad company *shall be liable* for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, *the presumption in all cases being against the company.*" (Italics ours.)

With this as a predicate the trial judge charged:

> "I charge you that, when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, *the presumption arises that the railroad company*

> *and its employes were negligent in each of the particulars specified in the plaintiff's petition*, and the burden thereupon shifts to the railroad company to show that its employes exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury, would be *entitled to recover*." (R., 165.) (Italics ours.)

This was in substance repeated later when the judge again charged:

> "The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is subject to the qualifications already given you, that, *when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in each of the particulars specified in the petition*, and the burden thereupon shifts to the defendant company to show that its employees exercised ordinary care and diligence in such particulars." (R., 171.) (Italics ours.)

Verdict and judgment were for Plaintiff and the intervenor. (R., 57-58.)

The eighteenth ground of the motion for a new trial challenged the validity of this charge and the

statute on which it was based on the theory, broadly speaking, that the statute as applied by the trial judge created a presumption of liability (arbitrary in character and extent), not a mere rule of evidence, and invidiously discriminated against railroads. (R., 81-82.) This was the seventh assignment of error in the Supreme Court of Georgia. (R., 20-22, 32-34.)

Opinion of the Supreme Court of Georgia.

The Supreme Court of Georgia held said Section 2780 constitutional and the challenged instructions proper. (R., 34-39, [Georgia Supreme Court, Sept. 15, 1928,] 144 S. E. 905, 909-911.) Without discussing the various grounds of attack—and without questioning the accuracy of our statement of the meaning and effect of said statute—that honorable court merely quoted at length from *Hawes* v. *Georgia*, 258 U. S. 1, and *Mobile, etc.* v. *Turnipseed*, 219 U. S. 35, and affirmed the judgment.

SPECIFICATION OF ERRORS

1. Said section 2780 of the Georgia 1910 Code as construed by the Georgia courts violates the due process of law clause of the Fourteenth Amendment to the Federal Constitution in that

(a) Said statute as charged in the case at bar permits a party plaintiff (who is neither an employee nor has any contractual relation with the defendant railroad) to recover without proving a single averment of negligence.

(b) Said statute does not create a mere rule of evidence. *It does not simply require a railroad to explain matters peculiarly within its knowledge.* But, on mere proof of the fact of collision with a train and resulting damage, it permits every averment of negligence in a plaintiff's petition, regardless of what it is, no matter how many and how fanciful, without an iota of proof to support them, to be considered as true and to be weighed as substantive evidence by a jury against actual proof by witnesses.

(c) Said statute's scope is not limited to those in privity of contract with a railroad but applies to all persons whomsoever.

(d) It permits recovery on mere proof of collision and damage without any evidence as to proximate cause.

(e) The presumption so created is not reasonable and rational. It is not limited to those things which in the normal course of events follow the proven fact. It is not rebuttable but actually has the effect of substantive evidence.

(f) Said statute as construed creates a rule of liability, not of evidence. (R., 3-4.)

2. Said section 2780 of the Georgia 1910 Code as construed by the Georgia courts violates the equal protection of the laws clause of the Fourteenth Amendment in that:

(a) In every class of cases sounding in tort in Georgia a party plaintiff is required to prove that some averment of negligence set forth in his petition constituted the proximate cause of the accident for which suit is brought. But this statute takes railroads out of that general and reasonable rule and permits recovery against railroads *without any proof of proximate cause.*

(b) In every class of suit in Georgia unproven averments of a plaintiff's petition are, as a matter of law, abandoned *except in collision cases against railroads.* This statute permits a jury to consider—and make it the basis of a verdict against a railroad—the unproven averment of a plaintiff's petition. (R., 4-5.)

3. The challenged portion of the trial judge's charge, correctly interpreting for the jury said statute as construed by the Georgia courts, was erroneous for the same reasons said statute is unconstitutional. (R., 5-7.)

ARGUMENT.

The original and amended petition contained ten separate and distinct averments of negligence. (R., 46-49, 51, pages 4-5, supra.) There was absolutely no evidence to support seven of these averments, to-wit, failure to blow the whistle properly, failure to keep a legal lookout, failure to check speed after plaintiff's husband was actually seen on the tracks, deliberately accelerating the speed of the train after her husband's dangerous predicament was seen, excessive speed, improper control of engine on approaching said crossing, running the locomotive with a "practically blind engineer."

There was only a shadow of proof to sustain the averments of improper maintenance of the track at the public crossing and negligent moving of the dirt and ballast at the crossing. (R., 49.) Obviously the engineer did not stop prior to collision.

Yet, with the record in this situation, the trial judge charged in substance that Plaintiff, having proved the fact of collision and death (of which there was no dispute), there arose a presumption that the Railway was negligent in each of the ten different ways specified in the petition, original and amended, and that unless the Railway affirmatively disproved these unproven charges Plaintiff "would be entitled to recover." (R., 165.) The jury were not even cautioned that some of these

averments had to be the proximate cause of Henderson's death in order to warrant a recovery.

There was no privity between Plaintiff's intestate and the Railway. They were strangers in law. There was no rational connection between the fact of collision and many averments in the petition. Several averments of negligence related to matters not peculiarly within the knowledge of the Railway.

JUDICIAL CONSTRUCTION OF THE STATUTE UNDER ATTACK.

The charge as given seems to be clearly in accord with the interpretation of this statute by the Georgia appellate courts to which we now invite consideration. This Court will, of course, accept as accurate the meaning and effect of this statute placed upon it by the Georgia courts. *Price* v. *Illinois*, 238 U. S., 446, 451.

(a) Mere proof of collision and damage creates a presumption of liability as to each and every averment in a plaintiff's petition, although unproven and regardless of the causal connection with the injury for which damages are sought.

In *Central of Georgia Railway Company* v. *Hartley*, 25 Georgia Appeals 110, 103 S. E. 259, 261, the court said:

> "Upon its being shown that an injury had been occasioned to the plaintiff by the running of the locomotives or cars of the defendant

> railroad company, *a presumption of liability arose** against the defendant in respect to the negligence charged, unless the company should make it appear that its agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. Civil Code 1910, Sec. 2780."

In *Western & Atlantic Railroad* v. *Dobbs*, 36 Ga. App. 516, 137 S. E. 407, the court said:

> "Under Section 2780 of the Civil Code 1910, which provides that 'a railroad company shall be liable . . . for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company,' there arises, upon proof of injury to a person by a servant of a railroad company, *not only a presumption of negligence of the company, but a presumption that the company's negligence was the proximate cause of the injury.*"

In *Georgia Railway and Electric Co.* v. *Bailey*, 9 Ga. App. 106, 70 S. E. 607, 608 in the syllabus prepared by the court itself is the following:

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*Portions of various opinions are italicized for emphasis and do not so appear in the originals.

"As against a railroad company, when the plaintiff proves he was injured by the operation of its cars, and proves his damages, *the statutory presumption of negligence completes in favor of the plaintiff a case which prima facie entitles him to recover. The presumption extends to all of the acts of negligence alleged, and primarily this presumption is sufficient to prove the negligence alleged.* For this reason it is not error for the Court, in charging the jury, to refer to the acts of negligence alleged; nor can the complaint that a charge upon the law applicable to the acts of negligence alleged is unauthorized by the evidence be sustained, *where a prima facie case of liability is so established* as to require evidence on the part of the defendant to rebut it."

(b) This presumption, based solely on the mere fact of collision and injury, is given the force and effect of substantive evidence and may be weighed by a jury against actual testimony.

In *Central of Georgia Ry. Co.* v. *Barnett*, 35 Ga. App. 528, 134 S. E. 126, 128-9 the court discussing the effect of the statute in question, said:

"Generally, the burden of proof is upon the plaintiff, and this original burden remains with him throughout the trial. Thus, whatever it is necessary for the plaintiff to prove as a matter of fact in order to make out a

prima facie case must be shown and must continue to be shown, without any shift of the burden, to the satisfaction of the jury, by a preponderance of the testimony throughout the trial, but when, in the opinion of the jury, this burden has been successfully carried, and continues to be carried by a preponderance of the testimony, the statute thereupon imposes upon the defendant the counterburden of disproving, by a preponderance of the testimony, *not the facts proven in order to establish the plaintiff's prima facie case, but the presumption of negligence thus made to arise as a legal consequence of such proof.* It is upon these questions relating to its defense, and not upon the issues necessary to plaintiff's prima facie case, that the defendant is required to furnish a preponderance of the evidence. If the defendant, in seeking to comply with the obligation imposed upon it by the statute, submits evidence for the purpose of overcoming the presumption of negligence thus raised against it as a matter of law, fails to carry the burden of disproving the negligence charged, and the evidence upon that question fails to preponderate either one way or the other, then the unimpaired presumption would continue to control, and under it the defendant would be liable as if no effort had been made to rebut it."

In *Payne, Agent* v. *Wells*, 28 Ga. App. 29, 109 S. E. 926 the court in its own syllabus says:

> "The general rule, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, where the allegation is not sustained by any evidence, does not apply in an action for damages against a railroad company for a homicide, where the evidence shows that the homicide was caused by the running of the defendant's cars, *for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration*, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error for the Court, in charging the jury, to refer to all the acts of negligence alleged, *although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence.*"

In *Murphy* v. *Georgia Ry & Power Co.*, 146 Ga. 297, 91 S. E. 108, 109 the court said:

> "The first part of this charge is criticized because it required the plaintiff to prove the allegations of negligence; whereas, upon proof that her husband was injured by the running of the cars of the defendant, a presumption

arose, by virtue of the statute (Civil Code 1910, sec. 2780), that the injury was due to the company's negligence as alleged in the petition. *It is not incumbent upon the plaintiff, in a case where the injury complained of is caused by the running of the defendant's cars, to prove the allegation of negligence of the defendant by a preponderance of the evidence. Killian* v. *Georgia Railroad Co.*, 97 Ga. 727 (3), 25 S. E. 384; Civil Code 1910, sec. 2780."

In *Georgia Southern & Florida Ry.* v. *Thornton*, 144 Ga. 381, 87 S. E. 388, 390 the court said:

"That decision has been reaffirmed several times, and it has been declared that *if, without more, it should be shown by evidence that the injury on account of which the suit was brought was caused by the running of an engine or cars of the defendant, a presumption would arise that the company or its agents were guilty of the acts of negligence alleged in the petition.*"

(c) In suits against railroads there need be no proof of proximate cause provided it is a collision case and the plaintiff proves the fact of collision and damage.

In *Ellenberg* v. *Southern Railway*, 5 Ga. App. 389, 63 S. E. 240, the court in reversing a judgment for defendant railroad, said:

> "When the plaintiff proved that her husband was killed by the train, the burden did not thereafter rest on her to *show how* the fatality came about. The law immediately raised the presumption that the defendant was negligent *in every detail mentioned in the petition*, and the onus was on the company to disprove each and every efficient and proximate act of negligence stated in the petition, or to show some affirmative defense sufficient to defeat the case."

So in *Western & Atlantic Railroad* v. *Thompson*, (Court of Appeals of Ga., Sept. 25, 1928), 144 S. E. 831 the court said:

> "A presumption of negligence proximately causing an injury arises against a railroad company upon proof that the injury was caused by the operation of the defendant's train. Civil Code 1910, sec. 2780. *It is not necessary* in order to enable the plaintiff to avail himself of this presumption, *for him to prove*, otherwise than by showing that his injury was caused by the operation of the defendant's train, *that the presumed negligence of the defendant proximately caused the injury.*"

So also is *Western & Atlantic Railroad* v. *Dobbs*, quoted supra, page 14.

(d) In Georgia the law forbids a trial judge submitting to a jury any averment unsupported by proof except in collision cases where a railroad is the party defendant.

We quote again from *Payne, Agent* v. *Wells*, supra, page 17, as follows:

> "*The general rule*, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, *where the allegation is not sustained by any evidence, does not apply in an action for damages against a railroad company* for a homicide, where the evidence shows that the homicide was caused by the running of the defendant's cars, for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error for the Court, in charging the jury, to refer to all the acts of negligence alleged, although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence."

The rule—and a different rule—as to all other tort feasors is stated in the following typical cases.

> *Atlanta* v. *Stewart et al*, 117 Ga. 144, 43 S. E. 443.

Western and Atlantic Railroad v. *Branan* 123 Ga. 692, 51 S. E. 650.
White v. *Kennon*, 83 Ga. 343, 9 S. E. 1082.
Railey v. *Garbutt, et al*, 112 Ga. 288, 37 S. E. 360.

(e) In every action ex delicto in Georgia there must be proof of proximate cause except in collision cases where a railroad is the defendant.

The general rule in Georgia as elsewhere regarding proof of proximate cause is stated in *Platt* v. *Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068, 1071 as follows:

> "The plaintiff who has established the fact that a defendant has been guilty of doing what he ought not to have done, or of not doing what he ought to have done has something further to do in order to show a cause of action in his behalf. He must show, not only that he has directly or *proximately* suffered injury thereby, but also that he is so related to the duty or the neglect thereof that he has the right to complain."

That this general rule which applies to all tort feasors does not apply to railroads in collision cases is demonstrated by the quotations from *Western & Atlantic R. R.* v. *Dobbs*, *Ellenberg* v. *Southern Railway*, and *Western & Atlantic R. R.* v. *Thompson*, quoted on pages 14, 18-19, supra.

THIS GEORGIA STATUTE IS NOT DUE PROCESS OF LAW.

From the Georgia decisions just cited we glean the following: A truck driver without stopping, looking or listening drives his huge automobile onto a grade crossing, colliding with a train. The driver is injured. He sues. His counsel files a petition or declaration alleging various and manifold grounds of negligence. There is no limit as to their number or character save the fancy of the pleader. The railroad denies them all.

The case comes on for trial. Plaintiff proves the fact of collision, injury and damage—that is all. Then the challenged statute comes into play. Immediately without more, due to its provisions, there is created as a matter of law a presumption that every single averment in plaintiff's declaration is true in point of fact. The driver of the truck is not a railroad employee—that is immaterial. The alleged negligent act does not relate to a matter peculiarly within the railroad's knowledge—that is immaterial. The claimed negligence may be contrary to the general experience of mankind—that is immaterial. There may be no proof of causal connection between averment and collision—that is immaterial.

Immediately upon mere proof of collision and damage defendant railroad is presumed to be liable. To escape such liability it must proceed to

disprove every one of plaintiff's averments—although plaintiff made no effort to prove them—although they embrace matters not peculiarly within defendant's knowledge—although there is no rational connection between the fact of collision and the averments of negligence.

But that is not all. This presumption does not give way to proof but may be weighed by a jury against actual testimony. This presumption, to-wit, that an unproven averment of negligence having no causal connection with and no rational relation to the collision is true in point of fact, may be given credence by a jury as against indisputable contrary proof and sustain a verdict of liability. See the Barnett and Payne cases, pages 15-17, supra.

(a) Reasonable and rebuttable presumptions are valid.

Legislatures have a wide latitude in making the existence of a given fact actually proven in evidence presumptive evidence of some other fact which, by common experience, logically follows. Such a presumption, however, to be valid must be both reasonable and rebuttable. For example, it is not the common experience of mankind that because an automobile is struck by a train that the engineer is practically blind. On the other hand, proof that a given individual has in his possession property which may be neither made nor imported legally creates the rebuttable presumption that it

was unlawfully obtained. So the owner of a tax deed is presumed, although it is a rebuttable presumption, to have complied with the necessary conditions precedent to legal acquisition of such a deed. Proof of one fact may be made presumptive evidence of some other fact provided there is some rational connection between them. But, for example, mere proof of collision does not justify the presumption that as soon as the engineer saw the automobile he deliberately put on more speed. The following cases illustrate the general rule as to valid presumptions.

James-Dickinson Co. v. *Harry*, 273 U. S. 119, 124.
Schlesinger v. *Wisconsin*, 270 U. S. 230.
Yee Hem v. *United States*, 268 U. S. 178.
Hawes v. *Georgia*, 258 U. S. 1.
Mobile, Jackson & Kansas City R. v. *Turnipseed*, 219 U. S. 35, 42-44.

(b) Presumptions based on neither common experience nor common sense are illegal.

Two of plaintiff's averments in the case at bar are truly remarkable. One is that after the engineer actually saw the deceased truck driver's dangerous predicament he deliberately speeded up his train (R., 48-49); the other that the engineer was so blind he could not see. (R., 51.) The trial judge charged, as said Georgia statute authorized, that upon mere proof of collision and damage the

presumption arose that both of these unproven averments were true. (R., 165.)

Aside from the obvious inconsistency—one averment that the engineer saw and the other that he could not see—it is certainly not the common experience of mankind that because a locomotive strikes an automobile on a grade crossing that either the engineer is practically blind or that he deliberately speeded up to make the disaster as complete as possible. There is no rational connection between the fact of collision and these two silly averments—yet under this Georgia statute these two averments are presumed to be true and mere proof by the Railway that they were not does not terminate the presumption. The jury could still weigh in the balances this presumption of an absurdity against actual proof to the contrary.

Typical invalid presumptions are those condemned in *Bailey* v. *Alabama*, 219 U. S., 219, 237, 244, and *McFarland* v. *American Sugar Refining Co.*, 241 U. S., 79, 86, 87.

(c) Due process of law is just common sense and justice.

There is and probably could be no all-inclusive definition of due process of law. Broadly the Fourteenth Amendment limits state legislatures to enactments which do not offend fundamental principles of right, reason and justice. *Truax* v. *Cor-*

rigan, 257 U. S., 312, 324, and *Endicott* v. *Encyclopedia Press*, 266 U. S., 285.

The beauty about "due process of law" is that it is not fixed and immutable but changes with the times. The automobile has revolutionized many things—the Nation's life itself. How they are run is well known as was thus recently described by the Supreme Court of Tennessee in *Southern Railway* v. *Simpson*, 149 Tenn., 458, 462, 261 S. W., 677, 678:

> "A murderous contempt for all regulations ordained to control their movements is too common, among those operating motor vehicles, to justify the court in permitting such lawlessness to be rewarded, unless the statutes so compel."

A rule may have been very well for "horse and buggy days" but absurd today. *Euclid* v. *Ambler Realty Co.*, 272 U. S., 365, 386-7. Pretermitting other questions, in the days before good roads and automobiles, it was one thing to require a railroad to merely explain a collision with a horse and buggy—a mere rule of evidence; but, today, to say that every time a train hits an automobile it is presumptively guilty of every charge an ingenious pleader can imagine is quite another.

The Georgia Supreme Court made no attempt to discuss the various grounds of unconstitution-

ality urged upon it but merely quoted at length from two decisions of this honorable Court, neither of which touch the questions we raise nor contain anything militating against our position. (R., 34-39.)

(d) Hawes v. Georgia, 258 U. S. 1.

Hawes was indicted under a Georgia prohibition act making it unlawful to manufacture intoxicating liquors. One section of this act made proof of the existence of distilling apparatus on the premises *prima facie* evidence that the person "in actual possession" of such premises had knowledge of the same. A still, boxes and barrels were found in three hundred yards of Hawes' house. An old path led from the premises to the still. Hawes made no attempt to deny or explain. He was found guilty. It was claimed that the presumptive section of the Georgia act was invalid but this court held otherwise, saying:

> "Distilling spirits is not an ordinary incident of a farm and in a prohibition State has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. On the contrary, it may be presumed that one on such a farm or one who occupies it will know what there is upon it. It is not arbitrary for the State to act upon the presump-

> tion and erect it into evidence of knowledge; not peremptory, of course, but subject to explanation, and affording the means of explanation. Hawes had such means. An explanatory statement was open to him with a detail of the circumstances of his acquisition of the place, and he availed himself of it. He could have called others to testify to the circumstances of his acquisition, for the circumstances were not so isolated or secret as not to have been known to others." (Pages 4-5.)

The presumption so sustained was neither unreasonable nor conclusive. There was a rational relation between the existence of the still on Hawes' place near his house connected by an old path and his knowledge of its presence.

How different the case at bar. Plaintiff proved a collision between the truck her husband was driving and one of the Railway's trains—the trial judge thereupon charged on authority of the statute under attack in effect, among other things, that proof of the fact of collision and Henderson's death justified the presumption, first, that the engineer after seeing the truck driver's dangerous predicament deliberately speeded up his train, and second, that the engineer was practically blind.

There is no rational connection between the proven fact and the presumed fact. It is common

knowledge that railroads do not entrust locomotives to men who cannot see—the mere wearing of glasses is no evidence of practical blindness. Likewise it is common knowledge that engineers put on brakes, not more steam, when automobiles get on the tracks. The Hawes case is no authority for the validity of the Georgia statute now under attack.

(c) Mobile, Jackson and Kansas City Ry. v. Turnipseed, 219 U. S. 35.

Hicks was an employee of the railroad and was killed while on duty. His administrator, Turnipseed, sued his employer in a Mississippi state court. Plaintiff won below and in the Supreme Court of Mississippi. The trial judge applied section 1985 of the Mississippi Code which is as follows:

> "Injury to Persons or Property by Railroads *prima facie* Evidence of Want of Skill, etc. In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies."

This statute was attacked on the ground that it violated the due process and equality clauses of the Fourteenth Amendment.

This Court sustained the act on the ground that (1) it constituted a mere rule of evidence not a rule of liability (see *Easterling Lumber Co.* v. *Pierce*, 235 U. S., 380, 382, specifically so holding; (2) was limited to cases where either an employee or passenger sued—in other words, it applies only where plaintiff and defendant railroad are related by contract; (3) created a mere rebuttable inference relating to a matter peculiarly within the railroad's knowledge; (4) as soon as proof was introduced the inference ended—in other words, the presumption could not be weighed against actual testimony; (5) such a rebuttable and reasonable inference or presumption was valid when there was "some rational connection between the fact proved and the ultimate fact presumed . . ."

The Supreme Court of Mississippi in construing this statute in *Columbus & G. Ry.* v. *Fondren*, 145 Miss., 679, 110 Southern Reporter, 365, said:

> "We think the court erred in granting the instructions for plaintiff on the *prima facie* negligence statute, for which error the judgment must be reversed. As stated, numerous witnesses testified as to how the injury occurred; and, while there was a conflict in the testimony as to how it happened, the jury had before it the testimony fully explaining how the injury occurred, and *it was the duty of the jury to decide the issue of negligence or*

not from the proof in the case, and not from the presumption of negligence under the prima facie statute. These instructions should not have been given, and we do not find any other instructions on this phase of the case which would cure the error or render the erroneous instructions harmless in the case.

"We see no use in again discussing this *prima facie* negligence statute. The rule laid down in *G. M. & N. R. R. Co.* v. *Brown*, 138 Miss., 39, 102 So., 855; *Davis* v. *Temple*, 129 Miss., 6, 91 So., 689; *G. M. & N. R. R. Co.* v. *Arrington* (Miss.), 107 So., 378; *Davis* v. *Elzey*, 126 Miss., 789, 88 So., 630, 89 So., 666; *A. & V. Ry. Co.* v. *Thornhill*, 106 Miss., 387, 63 So., 674; *Ala. Gr. So. R. R. Co.* v. *Daniell*, 108 Miss., 358, 66 So., 732; *Owen* v. *I. C. R. R. Co.*, 77 Miss., 142, 24 So., 899—seems to us to be clear and definite, and must be followed in such cases. In *G. M. & N. R. R. Co.* v. *Arrington, supra*, in which the question of whether or not the court erred in granting a *prima facie* negligence instruction where the testimony explained how the injury occurred, the court said:

" 'This instruction ought not to have been given because the testimony in the case sufficiently explains every material fact connected with the infliction of the injury, and clearly shows how the injury occurred; therefore, it was error to tell the jury that "the burden is

upon the defendant to 'exculpate' itself from any and all negligence" . . . But we shall say just one more thing in connection with this statute, and that is that, after it has served its purpose in the trial by compelling the railroad (company) to explain how the injury occurred, then the question of negligence or not is to be decided from the facts in the case.'

"And again, in the Brown case, *supra*, the court said:

" 'Where the facts are in evidence, the jury must determine the negligence or lack of negligence from the evidence and not from the statute.'

"Where the defendant's version of the facts is disputed by the plaintiff, then the duty devolves upon the jury to determine the truthfulness of the testimony; they cannot sidestep that duty by invoking the statute in such cases.

"In view of the conclusion reached, the judgment of the lower court is reversed and the case remanded."

Again, in *Gulf, etc. R. R.* v. *Brown*, 138 Miss., 39, 102 Southern Reporter, 855, the court said:

"In our opinion it was improper to invoke the *prima facie* statute as was done in instruction No. 6 for the plaintiff set out above. It

has often been held by this Court that where the facts are in evidence, *the jury must determine the negligence or lack of negligence from the evidence and not from the statute.* It was especially improper and harmful for the court to instruct the jury that the facts so proven must exonerate the railroad company from blame, otherwise the railroad company is not relieved from liability and the presumption controls."

How differently the Mississippi courts construed the Mississippi Prima Facie Act from the construction by the Georgia courts of the Georgia presumptive statute under attack.

This Mississippi Prima Facie Act, as construed by the Mississippi courts and this Court, is a mere rule of evidence obtaining only when the plaintiff and defendant are related by privity of contract and merely requires a railroad to explain matters peculiarly within its knowledge. The inference or presumption created by this Mississippi statute may not be weighed against substantive evidence. A jury must rest their verdict exclusively on the testimony—laying to one side the statute.

Burden of proof is a matter of substance and not a mere rule of evidence. *New Orleans & Northeastern R. R.* v. *Harris, Admr.*, 247 U. S.,

367, 372. It is one thing to provide by statute a reasonable rule of evidence as is done by the Mississippi Prima Facie Act; quite another to permit unproven averments, having no rational connection with those proven, to constitute substantive evidence and be the basis of a verdict and judgment as is done by the Georgia act under attack. This is not due process of law.

(f) Proof of proximate cause is indispensable to due process of law.

It is elemental that a party defendant may not be mulcted in damages merely because of negligence. The negligent act must cause, in whole or in part, the injury complained of. In the case at bar all Plaintiff had to do was to prove the fact of collision and damage. Then unless the Railway disproved the many fanciful and absurd averments of Plaintiff's petition, some of which Plaintiff did not even try to prove, a verdict against the Railway was justified by the statute.

Proximate cause is not a fact which is subject to inference or presumption. It must be proved and so proved as to take the cause of the accident out of "the realm of speculation and conjecture." *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan*, 271 U. S., 472, 478. Under this Georgia statute there may be a verdict against a railroad without any proof as to proximate cause. (See the Thompson case, page 19, supra.)

(g) Conclusion.

It is respectfully submitted that this Georgia act as construed by the Georgia courts offends the due process of law clause of the Fourteenth Amendment because,

1. It violates that fundamental principle of Anglo-Saxon jurisprudence that *allegata* and *probata* must correspond. *Southern Railway* v. *King*, 217 U. S., 524, 536; *United States* v. *Commissioner of Immigration*, 273 U. S., 103, 106. In the case at bar the jury were permitted to consider, in arriving at their verdict, seven averments of negligence supported by no proof.

2. Mere proof of collision without any proof of proximate cause will justify a verdict.

3. The presumption created is neither reasonable nor rebuttable. It is unreasonable because not limited by common experience or common sense. Proof of one fact will support the presumption of another fact with which it has no rational connection. It is not rebuttable because a jury may weigh this presumption against actual testimony.

4. It creates not a mere rule of evidence but a rule of liability between strangers.

This honorable Court in common with the public at large knows that the average driver of an

automobile does not stop, look and listen when approaching grade crossings (*Baltimore & Ohio* v. *Goodman*, 275 U. S., 66, 70) and constantly violates rules of the road and speed restrictions (*Southern Railway* v. *Simpson*, 149 Tenn., 458, 462). Automobiles now are in universal use, not only as pleasure cars but as means of private and public transportation. They are engaged in the common carrier business just as railroads. When one of these trucks, as in the instant case, dashes on to a railroad crossing and a collision occurs, there is neither justice nor common sense in presuming that the fault lay with the railroad. Common experience of mankind does not support such a presumption. We all know—it is common knowledge—that most collisions are due to the failure of the driver to stop, look or listen. To go further and hold that in such a case a legislature may enact a statute which permits the automobile driver to aver any number of different grounds of negligence and then merely prove the single fact of collision and recover on such unproven averments unless affirmatively disproved by the defendant—the jury being permitted to consider the unproven averments as substantive evidence as against actual testimony of the defendant—is so palpably arbitrary and unreasonable as to offend the fundamental conception of justice brought into our organic law by the Fourteenth Amendment.

THE GEORGIA STATUTE DENIES RAILROADS THE EQUAL PROTECTION OF THE LAWS.

(a) Unproven averments of negligence are as a matter of law dropped from consideration by a jury except in collision cases against railroads.

The general rule in Georgia requires a plaintiff to allege the negligence on account of which recovery is sought and then prove it. (See cases cited pages 20-21, supra.)

This is not required in the single class of cases where a railroad is the party defendant and the accident results from train operations.

In *Payne, Agent* v. *Wells*, 28 Ga. App., 29, 109 S. E., 926, the syllabus by the court is as follows:

> "*The general rule*, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, where the allegation is not sustained by any evidence, *does not apply in an action for damages against a railroad company for a homicide*, where the evidence shows that the homicide was caused by the running of the defendant's cars, for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error

> for the court, in charging the jury, to refer to all the acts of negligence alleged, although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence."

In other words, there is one law in Georgia for railroads and another for all other *tort feasors.*

In *Truax* v. *Corrigan*, 257 U. S., 312, this Court held that the requirements of the Fourteenth Amendment that no state should deny to any person the equal protection of the laws was aimed at "undue favor and individual or class privilege on the one hand and at hostile discrimination or the oppression of inequality on the other . . . Indeed, protection is not protection unless it does so."

In that case it was held that a state statute making a distinction "between the ex-employes and other *tort feasors* in the matter of remedies" violates the equality clause.

In every other case in Georgia a plaintiff abandons as a matter of law unproven averments of fact in his petition or declaration. Only in the case of a railroad may a plaintiff aver a fact, decline to even try to prove it and recover a judgment thereon. Only in suits against railroads may the unproven allegation in a pleading be considered actual evidence of the truth thereof.

The object and intent of this Georgia statute as construed by the Georgia courts is not reasonable or fair but constitutes invidious discrimination without any grounds in reason or equity therefor against railroads.

When a great automobile truck, almost as large as a box car, dashes on to a railroad crossing, the driver neither stopping, nor looking nor listening and a collision occurs, the driver suing in Georgia may aver numerous and sundry grounds of negligence in his petition or declaration and then prove the mere fact of collision and damage and this without more will warrant a verdict and judgment. Whereas, the railroad if it sues the truck driver must affirmatively prove by evidence the negligence averred in its petition and that it was the proximate cause of the collision. The Georgia rule is one that does not work both ways. It is respectfully submitted that it is unfair and constitutes an unjust and invidious discrimination against railroads and therefore violates the equal protection of the laws clause of the Fourteenth Amendment.

(b) Proof of proximate cause is required in all tort cases except when a railroad is the defendant in a collision case.

It is the general rule in Georgia that a party plaintiff suing in *tort* must prove that some averment in his declaration caused or contributed to the accident complained of. (See cases on page 21, supra.) This reasonable rule seems to be uni-

versal except when a railroad is sued in a collision case. (See cases, page 21, supra.)

In the case at bar the trial judge specifically authorized a verdict against the Railway upon mere proof of the fact of collision and damage unless the Railway affirmatively disproved all the averments of negligence in plaintiff's declaration, proven or unproven. *Proximate cause was ignored.*

It is respectfully submitted that, while the classification of railroads for many purposes is justified, to take them out of the general rule requiring proof of proximate cause in actions *ex delicto* can be based on no rational grounds. It is simply invidious discrimination. *Truax* v. *Corrigan*, 257 U. S., 312, 331-334, 335-340.

It is respectfully submitted that Section 2780 of the 1910 Georgia Code as construed by the Georgia courts and applied in the case at bar is unconstitutional and that the charge of the trial judge enforcing it against the Railway was erroneous.

Respectfully submitted,

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January 18, 1929.